STATE OF MICHIGAN

COURT OF APPEALS

BRENDA FORD WHITE,

Plaintiff-Appellant,

and

PATRICK FORD,

Plaintiff,

v

O.L. MATTHEWS, M.D., WOOK KIM, M.D., JORAM MOGAKA, M.D., HARPER UNIVERSITY HOSPITAL, and, ST. JOHN'S HOSPITAL AND MEDICAL CENTER, INC.,

Defendants-Appellees.

UNPUBLISHED
April 16, 2015

No. 320174
Wayne Circuit Court
LC No. 13-013472-NH

Before: HOEKSTRA, P.J., and MARKEY and DONOFRIO, JJ.

PER CURIAM.

In this wrongful death suit involving allegations of medical malpractice in the treatment of Bettie Ruth Ford, plaintiff Brenda White appeals as of right the orders granting summary disposition to defendants O.L. Matthews, MD, Wook Kim, MD, Joram Mogaka, MD, Harper University Hospital, and St. John's Hospital and Medical Center, Inc ("St. John's"). Because plaintiff's claim is barred by the statute of limitations and plaintiff cannot proceed in propria persona on behalf of her mother's estate, we affirm.

The present case arises from the death of plaintiff's mother, Bettie Ruth Ford, on October 16, 2008. Following her death, plaintiff's brother, Patrick Ford, was appointed personal representative of the estate on March 20, 2012. The probate court later suspended Patrick Ford's authority and administratively closed the estate on September 23, 2013. On October 2, 2013, plaintiff petitioned to reopen the estate, but her request was not granted until November of 2013, when the probate court reopened the estate and appointed plaintiff as successor personal representative with letters of authority issued on November 5, 2013.

After the probate court closed the estate, and before plaintiff's appointment as successor representative, plaintiff, acting in propria persona, filed the present case in circuit court on

October 15, 2013. Plaintiff alleged claims of medical malpractice against Dr. Matthews, Dr. Kim, and Dr. Mogaka. She also claimed that Harper University Hospital and St. John's had been negligent in hiring, supervising, and retaining the doctors in question.[1] Defendants moved for summary disposition, which the trial court granted. The trial court concluded that summary disposition was appropriate because: (1) plaintiff had failed to file a notice of intent and an affidavit of merit, (2) the statute of limitations had since expired, and (3) plaintiff could not proceed in propria persona on behalf of her mother's estate. Plaintiff now appeals as of right.

On appeal, plaintiff argues that the trial court erred in granting summary disposition to defendants. Specifically, she asserts that her claim was filed within the applicable statute of limitations, that she should be permitted to rectify any deficiencies relating to the notice of intent and affidavit of merit, and that, in particular, she should have been provided an opportunity for discovery to obtain an expert opinion. Additionally, plaintiff argues that, contrary to the trial court's conclusions, she possessed the authority to proceed on behalf of her mother's estate. Ultimately, plaintiff maintains that she has a meritorious medical malpractice claim which should not have been dismissed by the trial court. For the reasons described below, we find plaintiff's various arguments to be without merit.

We review a trial court's decisions regarding a motion for summary disposition de novo. *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 493; 791 NW2d 853 (2010). Summary disposition is properly granted under MCR 2.116(C)(7) when a plaintiff's complaint is time-barred by the applicable statute of limitations. *Burton v Macha*, 303 Mich App 750, 754; 846 NW2d 419 (2014). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), the trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery." *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010). When the facts are not in dispute, whether a claim is barred by the applicable statute of limitations poses a question of law which this Court reviews de novo. *Sills v Oakland Gen Hosp*, 220 Mich App 303, 307; 559 NW2d 348 (1996).

For purposes of a medical malpractice action, a claim "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1). The period of limitations for bringing a medical malpractice claim is two years from the date the claim accrues.

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[1] Although plaintiff did not specifically categorize her claims against Harper University Hospital and St. John's as medical malpractice, it is nonetheless apparent that these claims sound in medical malpractice because, in the course of its professional relationship with a patient, the provision of professional medical care and treatment by a hospital includes supervision, training and retention of physicians and medical staff. *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647, 652-654; 438 NW2d 276 (1989). See generally *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 422; 684 NW2d 864 (2004).

MCL 600.5805(6).[2] Also relevant to the present dispute, the wrongful death saving provision provides a personal representative two years following the issuance of the letters of authority in which to commence suit, with the caveat that suit may not be commenced more than three years after the period of limitations has expired. See *Burton*, 303 Mich App at 755. Specifically, former MCL 600.5852,[3] provided:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

In addition to the time constraints imposed by the statute of limitations, a plaintiff seeking to bring a medical malpractice suit must comply with certain mandatory statutory requirements. Specifically, before bringing suit, pursuant to MCL 600.2912b, a plaintiff must first provide health care professionals and health facilities a written notice of intent to commence suit. *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 220; 850 NW2d 667 (2013). When a plaintiff has not provided a notice of intent and nonetheless files a complaint, dismissal is appropriate because "the failure to comply with the statutory [notice] requirement renders the complaint insufficient to commence the action." *Burton v Reed City Hosp Corp*, 471 Mich 745, 754-754; 691 NW2d 424 (2005). Moreover, when a plaintiff's case is dismissed for failure to satisfy MCL 600.2912b, he or she must still comply with the statute of limitations. *Burton*, 471 Mich at 753. Thus, when a plaintiff fails to provide a notice of intent and the statute of limitations has expired, a plaintiff's claim is time-barred and summary disposition is properly granted. See, e.g., *Driver v Naini*, 490 Mich 239, 251; 802 NW2d 311 (2011).

Similarly, in a medical malpractice action, MCL 600.2812d mandates that a plaintiff or his or her attorney "shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness . . . ." MCL 600.2912d(1). When a plaintiff files a complaint without an accompanying affidavit of merit, "the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). Dismissal is appropriate for failure to file an affidavit of merit, and a plaintiff whose complaint is dismissed for this reason must still comply with the applicable statute of limitations.

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[2] Under MCL 600.5838(2), a plaintiff's medical malpractice claim may also be brought "within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." However, plaintiff makes no argument for the application of this discovery rule and, in any event, it is clear from plaintiff's complaint, as well as her family's consultations with attorneys, that she knew of a possible cause of action long before filing the present lawsuit. In short, MCL 600.5838(2) is inapplicable.

[3] The former version of this rule applies because plaintiff's claim accrued before March 28, 2013. See *Burton*, 303 Mich App at 755-756 & n 2.

Id. at 551-552. Consequently, when a plaintiff fails to file an affidavit of merit and the limitations period has expired, summary disposition should be granted. See *id.*; *Ligons v Crittenton Hosp*, 490 Mich 61, 75; 803 NW2d 271 (2011).

In the present case, plaintiff filed a complaint on October 15, 2013. It is uncontested, however, that plaintiff completely failed to provide defendants with either a notice of intent or an affidavit of merit. Because plaintiff failed to satisfy these requirements, the trial court properly dismissed plaintiff's lawsuit. See *Burton*, 471 Mich at 753; *Scarsella*, 461 Mich at 549.

Moreover, because the statute of limitations had expired, dismissal with prejudice was appropriate and defendants were entitled to summary disposition under MCR 2.116(C)(7). Specifically, even accepting plaintiff's assertions that negligent acts occurred on the date of her mother's death, the claims in question accrued at the latest on October 16, 2008, and the statute of limitations thus expired on October 16, 2010. MCL 600.5838a(1); MCL 600.5805(6). Under the wrongful death saving provision, a personal representative could commence an action, at the absolute latest, no more than three years after the running of the period of limitations, in this case October 16, 2013. See MCL 600.5852. Although it is true that plaintiff filed a complaint on October 15, 2013, as discussed, she did so without providing the requisite notice of intent and affidavit of merit. Her complaint was thus insufficient to initiate the present action and it did not toll the running of the statute of limitations. See *Burton*, 471 Mich at 753-754; *Scarsella*, 461 Mich at 549. Indeed, the wrongful death savings provision on which plaintiff attempts to rely cannot be tolled. See *Waltz v Wyse*, 469 Mich 642, 650; 677 NW2d 813 (2004). Consequently, the period for plaintiff to file suit expired without plaintiff commencing suit, and defendants were entitled to summary disposition pursuant to MCR 2.116(C)(7). See *Ligons*, 490 Mich at 75; *Driver*, 490 Mich at 251.

Given the foregoing analysis, we also reject plaintiff's assertion that the trial court erred in granting summary disposition without providing her time for discovery and, in particular, the opportunity to seek an expert opinion necessary for an affidavit of merit. Summary disposition is generally premature if granted before discovery on a disputed issue is complete; however, "summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). In this case, the statute of limitations has expired and discovery would not have defeated defendants' statute of limitations of defense. Because there was not a "fair chance" of uncovering information favorable to plaintiff's efforts to oppose defendants' motions for summary disposition, the trial court's grant of summary disposition without further discovery was not premature. See *id.*

Aside from the fact that plaintiff's claims are barred by the statute of limitations, we note briefly that, on October 15, 2013, plaintiff was not yet the personal representative of the estate, nor was her brother Patrick Ford the personal representative because his authority had been suspended and the estate closed. As a successor personal representative, plaintiff could file "a complaint *after* her appointment, not *before* her appointment." See *McMiddleton v Bolling*, 267 Mich App 667, 673; 705 NW2d 720 (2005). Given that the estate had been closed and plaintiff had not yet been appointed as successor personal representative, plaintiff and Patrick Ford lacked the authority, and they knew that they lacked the authority, to initiate suit on October 15, 2013.

Cf. *Fisher v Volkswagenwerk Aktiengesellschaft*, 115 Mich App 781, 785-786; 321 NW2d 814 (1982). By initiating the present action when she lacked authority to do so, plaintiff misrepresented her capacity to sue, and the subsequent reopening of her mother's estate does not make her complaint proper. See *id.*

Moreover, when plaintiff filed the instant complaint, she attempted to proceed in propria persona. It is well-settled, however, that a personal representative who is not a lawyer may not proceed in propria persona on behalf of an estate. See *Shenkman v Bragman*, 261 Mich App 412, 416; 682 NW2d 516 (2004). In particular, although MCL 600.5852 allows a personal representative to bring a medical malpractice action in her own name, "the legal right she represents belongs to the estate, and her claim must be brought on behalf of the estate." *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 420; 733 NW2d 755 (2007). See also MCR 2.201(B)(1). It follows that when a personal representative attempts to proceed in propria persona on behalf of an estate, he or she is not exercising his or her constitutional right to represent "his own proper person," Const. 19662, art 1, § 13, but, rather the personal representative is instead representing a client, namely—the estate. *Shenkman*, 261 Mich App at 416. Consequently, a nonlawyer attempting to proceed in propria persona on behalf of the estate is engaged in the unauthorized practice of law in contravention of MCL 600.916. *Shenkman*, 261 Mich App at 416. Therefore, in this case, given plaintiff's improper attempt to proceed in propria persona on behalf of the estate, the trial court did not err in dismissing her complaint on this basis. See *id.* at 413, 416.

Finally, to the extent plaintiff generally argues that, despite the many defects in her suit, she has a meritorious malpractice claim that should not be dismissed, we decline to address plaintiff's unsubstantiated arguments relating to the underlying merits of her claims. For the reasons discussed above, summary disposition was properly granted under MCR 2.116(C)(7), and a motion under this subrule is not concerned with the merits of a claim "but rather certain defenses which may make a trial on the merits unnecessary." *DMI Design & Mfg, Inc v Adac Plastics, Inc*, 165 Mich App 205, 208; 418 NW2d 386 (1987). In short, summary disposition was proper because the statute of limitations had expired and we need not address plaintiff's unsupported assertions regarding the merits of her claims.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Pat M. Donofrio